

Supreme Court, U. S.
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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1978

No. 78-360

GALEN LEE RANDOLPH and DUQUE WILLIAMS,
Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

GALEN LEE RANDOLPH and MOSES TATAKAMOTONGA,
Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Court of Appeal of the State of California, First Appellate District, Division Three, entered on April 13, 1978, upholding the constitutionality of California Penal Code §311.2 and affirming the denial of Appellants'

petition for a writ of prohibition and/or mandamus in the Superior Court of San Mateo County, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

A. THE OPINION BELOW.

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Three, is not published in the official reports, but is reproduced at Appendix A attached hereto. Though the Municipal and Superior Courts of San Mateo County have made judgments and orders relevant to the present appeal, none of these decisions have been rendered in the form of a written opinion.

B. SUPREME COURT JURISDICTION

The action below was a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, made by way of a petition for a writ of prohibition and/or mandamus, to the validity of the statutory scheme created by California Penal Code §311.2, which makes the exhibition and distribution of obscene matter by individuals engaged in various occupations subject to criminal penalties, while exempting from its criminal proscriptions the same activities when performed by similarly situated individuals engaged in other occu-

pations. The action below challenged, as well, the jurisdiction of the Municipal Courts of San Mateo County to entertain criminal proceedings for violations of California Penal Code §311.2 against the present Appellants (Defendants below).

In two related criminal actions in the Municipal Courts of San Mateo County, charging Appellants with violations of California Penal Code §311.2 (exhibition and distribution of obscene matter), Appellants demurred to the criminal complaints, asserting that the Municipal Courts lacked jurisdiction to proceed since California Penal Code §311.2 was repugnant to the Equal Protection Clauses of the United States and California Constitutions. The Municipal Court, in each instance, overruled the demurrer, whereupon Appellants petitioned the Superior Court of San Mateo County for a writ of prohibition and/or mandamus seeking to compel the trial court to grant Appellants' demurrer and to cease all proceedings against Appellants. After a hearing, the Superior Court upheld the constitutionality of California Penal Code §311.2 and denied Appellants' petition. Appellants then appealed this denial to the California Court of Appeal. The Court of Appeal, entering its opinion on April 17, 1978, reviewed the discriminatory scheme of California Penal Code §311.2 under a "strict scrutiny" standard and found that the statute was not repugnant to the Equal Protection Clause, thereby affirming the Superior Court's ruling. A timely petition for hearing was denied by the California Supreme Court on June 9, 1978. A notice of

appeal was filed in the California Court of Appeal on July 10, 1978.

The jurisdiction of the Supreme Court to review this decision of the California Court of Appeal, upholding the validity of a state statute after a Fourteenth Amendment Equal Protection attack, by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

C. STATUTE(S) CHALLENGED

This action directly challenges the constitutionality of California Penal Code §311.2 (West), as amended by California Statutes 1975, c. 793, p. 1817, §1, which, in attempting to regulate the exhibition and distribution of obscene matter, creates a criminal classification scheme whereby individuals engaged in various occupations are subject to criminal prosecution, while similarly situated individuals engaged in other occupations are free from criminal liability, regardless of any considerations of the obscene matter involved. This statute reads as follows:

§311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state; exemptions

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who

offers to distribute, distributes or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

(c) Except as otherwise provided in subdivision (b), the provisions of subdivision (a) with respect to the exhibition of, or the possession with intent to exhibit any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly, or indirectly, over the exhibition of the obscene matter.

Though California Penal Code §311.2 was again amended by California Statutes 1977, c. 1061, pp. 673-4, §1, effective September 24, 1977, this amendment is not relevant to the substantial questions raised in this appeal. In addition, the 1977 amendment did not become effective until months after the initiation of criminal proceedings against Appellants.

Several of the terms and phrases used in the challenged statute are defined in California Penal Code §311 (West), as amended by California Statutes 1970,

c. 1072, p. 1908, §1. This section reads, in pertinent part:

§311. Definitions

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material

or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

The text of these two statutory sections can be found at pages 135-139 of the 1978 Pocket Part to the Annotated California Penal Code (West Publishing Company).

D. QUESTIONS PRESENTED

The ultimate question for this appeal is whether California Penal Code §311.2, *supra*, by creating a statutory classification scheme whereby certain individuals are subject to criminal liability for the exhibition and distribution of obscene matter, while other similarly situated individuals are exempt from criminal penalties solely because of the occupation in which they are engaged, is unconstitutional as repugnant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

This particular case analyzes the foregoing ultimate question in light of a number of related questions, such as:

Whether California Penal Code §311.2, imposing burdens on individuals exhibiting and distributing various written and visual materials, prior to a judicial determination of the obscene nature of those materials, touches upon fundamental First Amendment rights, and must, therefore, be strictly scrutinized by this Court. Further, once it has been shown that the discriminatory classifications of California Penal Code §311.2 do touch upon fundamental First Amendment interests, what is the nature and extent of the burden on the State of California to justify this statutory classification scheme: must the State demonstrate, by actual proof, a bona fide "compelling state interest" behind this discriminatory scheme or may the State and the courts hypothesize a convenient, but possibly false, *post hoc* rationalization for this statute without basis in the trial court record? The consideration of this substantial federal question was postponed for "another day" by this Court in *Craig v. Boren*, 429 U.S. 190, 199, fn. 7 (1976).

Assuming *arguendo*, as did the California Court of Appeal below, that the classification scheme of California Penal Code §311.2 is necessary because it allows "the State to control obscenity while at the same time providing maximum protection for free speech guarantees by removing from mere employees and

projectionists the onus of deciding whether distribution or exhibition of possibly obscene matter should be suppressed" (Appendix A, viii; emphasis in original), can this statutory scheme survive either a "rational basis" review or a "strict scrutiny" review when its criminal liabilities and its "maximum free speech protections" rest solely upon the occupation in which an individual is engaged and *not* upon the nature of the *possibly* obscene matter involved?

E. STATEMENT OF THE CASE

This civil action has been, from its inception, a direct Equal Protection attack on the California statutory scheme, California Penal Code §311.2, which criminally proscribes the exhibition and distribution of obscene matter with respect to individuals engaged in various occupations, while exempting from criminal liability other similarly situated individuals engaged in different occupations, made by way of a petition for a writ of prohibition and/or mandamus. Though civil in nature, this action is a consolidated attack on two separate, but related, criminal proceedings involving Appellants (Defendants below).

With respect to the first of these criminal cases, Appellants GALEN LEE RANDOLPH and DUQUE WILLIAMS were arrested on or about February 28, 1977 in Redwood City, California, and charged, by way of a timely filed criminal complaint in the Municipal Court for the Southern Judicial District of

San Mateo County, with violating California Penal Code §311.2 (the exhibition and distribution of obscene matter). On April 13, 1977, Appellants RAN-DOLPH and WILLIAMS filed a written demurrer to this criminal complaint, asserting that the Municipal Court lacked jurisdiction over the complaint because California Penal Code §311.2 was unconstitutional as repugnant to the Equal Protection Clause of the United States Constitution. This demurrer was overruled by the Municipal Court, without written opinion, on June 1, 1977.

With respect to the second of these criminal proceedings, Appellants GALEN LEE RANDOLPH and MOSES TATAKAMOTONGA have been charged, by way of a criminal complaint filed originally in the Municipal Court for the Central District of San Mateo County on March 2, 1977, with violations of California Penal Code §311.2. A change of venue to the Northern District of San Mateo County was granted on May 18, 1977. On April 11, 1977, Appellants filed a written demurrer to this criminal complaint, asserting that the Municipal Court lacked jurisdiction to entertain the matter because California Penal Code §311.2 was unconstitutional on its face and violative of the Equal Protection Clause of the United States Constitution. After a hearing on June 17, 1977, the Municipal Court overruled the demurrer.

Following the dismissals of each of these demurrers, Appellants filed, on June 28, 1977, a Petition for Writ of Prohibition and/or mandamus in the Super-

rior Court of San Mateo County, again challenging the constitutionality of California Penal Code §311.2 under the Equal Protection Clause of the Fourteenth Amendment, to compel each of the Municipal Courts to grant Appellants' demurrer and to restrain each of these courts from entertaining further criminal proceedings against Appellants. After a consolidated hearing on July 14, 1977, the Superior Court denied Appellants' petition in a Minute Order stating, *in toto*, "Petition for Writ of Prohibition and Mandamus re constitutionality is denied." The Superior Court, in addition, denied Appellants' petition for a stay of proceedings.

On July 22, 1977, Appellants filed a timely notice of appeal from the denial of the Superior Court of the consolidated petition for a writ of prohibition and/or mandamus. Subsequently, Appellants renewed their consolidated petition for a writ in the California Court of Appeal, First Appellate Division. This petition was denied, without opinion, on September 12, 1977. A timely petition for hearing to the California Supreme Court was denied, again without opinion, on October 13, 1977.

On October 17, 1977, each of the present Appellants entered a plea of guilty to violating California Penal Code §311.2. Appellant GALEN LEE RANDOLPH was sentenced to serve six (6) months in jail, four (4) months suspended, and to pay a fine. He is currently on bail pending the determination of this appeal. Appellant DUQUE WILLIAMS has served

ten (10) days in jail and is currently on probation, the terms of which preclude his employment "in any theater, bookstore, or other establishment selling, exhibiting, or otherwise dealing with obscene matter, except that defendant DUQUE WILLIAMS may seek and obtain employment as a motion picture operator or projectionist with a person licensed by any city or county as permitted by the terms of Penal Code §311.2(b)". Appellant MOSES TATA-KAMOTONGA received a suspended sentence.

On April 13, 1978, the California Court of Appeal, First Appellate District, Division Three, filed its opinion (attached hereto as Appendix A) upholding the constitutionality of California Penal Code §311.2 under the Equal Protection Clauses of the United States and California Constitutions, and, thereby affirming the denial of Appellants' petition for a writ of prohibition and/or mandamus by the Superior Court. The California Court of Appeal reviewed the classification scheme of California Penal Code §311.2 under a "strict scrutiny" standard, but found that the statute's nexus of criminal liabilities and exemptions from those liabilities to be justified as necessary to further California's twofold compelling interest in controlling obscenity and in providing maximum protection for free speech guarantees. A timely petition for hearing was denied by the California Supreme Court on June 9, 1978. This appeal followed.

In sum, the claim of federal unconstitutionality directed at California Penal Code §311.2 has been squarely raised at every stage of these proceedings.

Further, at each of the pre-trial hearings before both the Municipal and Superior Courts, Appellants openly invited the prosecution to meet its burden, by argument or by presentation of evidence, to justify the classification scheme of California Penal Code §311.2. The prosecution declined to accept this invitation. On appeal to the California Court of Appeal, Appellants again raised the question of the proper allocation of the burden of justifying a discriminatory statutory scheme and challenged the propriety of an appellate court supplying a state interest behind a discriminatory statute with no basis in the trial court record. These challenges were not discussed by the Court of Appeal in its opinion. In the present appeal, Appellants again raise these federal questions.

F. THIS CASE IS SUBSTANTIAL

The basic issue presented by this appeal is simply whether the classification scheme created by California Penal Code §311.2, imposing criminal penalties on various employees engaged in the distribution and exhibition of obscene matter while exempting other similarly situated employees from these criminal liabilities, is repugnant to the Equal Protection Clause of the Fourteenth Amendment. Resolution of this question is necessary to explain the meaning and scope of the various Equal Protection standards and to understand the limitations, imposed by the Equal Protection Clause, on a state's power to regulate the distribution and exhibition of obscene matter.

"Equal protection", of course, does not mean that a state must treat all persons similarly. The Equal Protection Clause of the Fourteenth Amendment does mean, however, that a state may not "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute". *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1971); *Reed v. Reed*, 404 U.S. 71, 75-6 (1971). A statutory classification scheme may not, therefore, be arbitrary; rather, the classification must rest upon some ground fairly and substantially related to the purpose of that statute. The classifications created by California Penal Code §311.2, drawn along the lines of occupation and employment status, are not fairly and substantially related to the statute's express purpose of curbing the distribution and exhibition of obscene matter. Enforcement of this statute would, thus, deny Appellants the equal protection of the laws.

1. California Penal Code §311.2 Is Discriminatory On Its Face

While subdivision (a) of California Penal Code §311.2 categorizes the distribution or exhibition of obscene matter as criminal¹, subdivision (b) and (c) exclude various employees from the operation of this criminal statute on the basis of the nature of the work they perform. The interplay of these subdivi-

¹California Penal Code §311 provides, in pertinent part, that: "... (d) 'Distribute' means to transfer possession of, whether with or without consideration. . . . (f) 'Exhibit' means to show. . . ."

sions creates a statutory scheme with four general classifications:

- (1) Every person who distributes obscene matter, whether or not having a financial interest in or any control over such distribution, is guilty of a crime.
- (2) Every person exhibiting obscene matter in the course of his employment by another, who has no financial interest in the place where he is employed and "has no control, directly or indirectly over the exhibition", is *not* guilty of a crime.
- (3) Every motion picture operator or projectionist exhibiting obscene matter in the course of his employment by another, who has no financial interest in the place where he is employed, is *not* guilty of a crime—regardless of whether he has any "control" over such exhibition.
- (4) Every person exhibiting obscene matter, who is not a motion picture operator or projectionist, and who has either a financial interest in or control over such exhibition is guilty of a crime.

This criminal statute thus accords substantially different treatment to the class of employees engaged in the distribution of possibly obscene matter, such as bookstore clerks, library clerks, handbill distributors, than is accorded to the class of employees engaged either as motion picture operators or projectionists or in the exhibition of possibly obscene matter, such as gallery or museum workers and

placard bearers. The statute creates an additional discriminatory classification based on whether or not an individual is employed by a business licensed by a city or county.

2. The Classification Scheme Of California Penal Code §311.2 Must Be Strictly Scrutinized

When a statute draws distinctions that impinge upon fundamental freedoms or interests, such as freedom of speech, then a statutory classification is subject to a "strict scrutiny" review where the distinction must be shown to be necessary to further the achievement of a compelling state interest. *Sherbert v. Verner*, 374 U.S. 398, 403 and 406 (1963); see also, *Kramer v. Union School District*, 395 U.S. 621, 626-28 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1968); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667 (1966); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941). The statutory scheme contained in California Penal Code §311.2 impinges upon fundamental First Amendment, free speech interests, and must, therefore, be judged by this strict standard. See, e.g., *Smith v. California*, 361 U.S. 147 (1959).

Of course, there is no fundamental freedom to distribute or exhibit obscene matter. *Miller v. California*, 413 U.S. 15, 18 (1973). However, since obscenity is often separated from constitutionality protected expression by only a "dim and uncertain line", purported obscene matter maintains, until such time as it is judicially determined to be unprotected speech, the same preferred position as does free speech gen-

erally. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); see also, *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Since the regulation of obscenity by California Penal Code §311.2 may very well cross over that elusive line separating obscenity from free speech and since that statute imposes heavy burdens on individuals engaged in the distribution or exhibition of possibly obscene matter, prior to any judicial determination of obscenity, then the statutory classification in question impinges on fundamental free speech freedoms, and must, therefore, be judged by the "strict scrutiny" standard.

3. The Burden Of Justifying California Penal Code §311.2 Is On The State

Once it is determined that a classification scheme affects a fundamental freedom or interest, as California Penal Code §311.2 does, then the burden of justifying that scheme shifts to the state, first to establish that it has a compelling state interest which justifies the law, and second, to demonstrate that the distinctions drawn by the law are necessary to further that purpose. *Kramer v. Union School District*, *supra*; *Harper v. Virginia Board of Elections*, *supra*; see also, *Loving v. Virginia*, 388 U.S. 1, 9 (1967). Though invited by Appellants during pretrial hearings before both the Municipal and Superior Courts below to argue or to present evidence to justify the classification scheme of California Penal Code §311.2, the Prosecution (the State) declined to meet its burden. Moreover, rather than enforcing this burden,

the California Court of Appeal below chose to divine, without any basis in the trial court record, its own hypothetical "compelling state interest" behind the classifications in question. Appendix A, p. vii. Appellants contend that both the Prosecution and the Court of Appeal have gone astray of one of the central tenets of the strict equal protection standard.

Appellants are cognizant that this Court has not yet fully defined the nature and the scope of the state's burden in justifying a discriminatory classification scheme impinging on a fundamental interest. See, *Craig v. Boren*, 429 U.S. 190, 199, fn. 7 (1976). However, if the strict equal protection standard is to have any meaning, then the State's burden must be a heavy one. The rationale behind placing a heavy burden on the State and Prosecution is simply that, when fundamental interests are at stake, a court should not base its decision upon conjecture or hypothesis; rather, a court exercising its role as the guardian of constitutional rights must assess those rights in light of the concrete facts presented to it. In this regard, the observations of Professor Gerald Gunther in his article, "In Search Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection", 86 Harv. L. Rev. 1, 21 (1972), appraising the direction of this Court in equal protection cases, is illuminating:

Putting consistent new bite into the old equal protection would mean that the court would be less willing to supply justifying rationales, by exercising its imagination. It would have the

court assess the means in terms of legislative purpose that have a substantial basis in actuality, not merely in conjecture. Moreover, it would have the justices gauge the reasonableness of questionable means as the basis of materials that are offered to the court, rather than resorting to rationalizations created by a perfunctory judicial hypothesizing.

Again, Appellants urge this Court to resolve this substantial question.

4. The Classification Scheme Of California Penal Code §311.2 Cannot Survive Either A Strict Scrutiny Or Rational Basis Test

The elaborate distinctions in the statutory scheme of California Penal Code §311.2 are contrivances beyond rational justification. The State has not demonstrated, nor is the State able to demonstrate, why conduct considered criminal when committed by some employees or persons becomes innocent when committed by others. The distinctions drawn by the statute are arbitrary and are certainly not necessary or even rationally related to further any real or imagined state interest.

To appreciate fully the arbitrariness of these classifications, one need only to imagine a concrete factual pattern to which the statute would apply.² For ex-

²For the sake of brevity, Appellants omit any discussion of the problems raised by the lack of definition for the terms "financial interest" and "control, directly or indirectly". In each of these hypothetical situations, Appellants are positing that the factors of "financial interest" and "control" are identical and constant with respect to each of the hypothetical employees.

ample, with respect to a movie theatre showing obscene films, the projectionist would enjoy absolute freedom from criminal liability under subdivision (b). An usher for that theatre, however, who merely passes out programs containing an obscene picture, is guilty of a crime under subdivision (a). Further, if that usher carried a sandwich-board type of sign containing the very obscene picture found on the programs and paraded that sign up and down the aisles of the movie theatre (or up and down a public thoroughfare), he would be immune from criminal prosecution under subdivision (c).

Similarly, a clerk who works in a gallery, a reading room, a library, or a store merely displaying obscene materials presumably would be free of any criminal liability because of subdivision (c). Yet, if that same clerk picks up any one of those obscene articles and hands it to another, whether ringing up a sale or checking out a book or lending a picture or magazine, that clerk would be guilty of a crime under subdivision (a).

In addition to the criminal proscription of conduct on the basis of the nature of a person's occupation, Penal Code §311.2 differentiates between employees who work for a person or entity licensed by a city and county and those employees who work for an unlicensed employer. Hence, a projectionist showing an obscene movie in a licensed movie house is free from criminal liability, while an individual showing the same movie in a private, voluntary, charitable, or temporary setting would be guilty of a crime.

The Court of Appeal below attempted to justify these discriminatory classifications by conjecturing that they were necessary to further the hypothetical, twofold compelling state interest in regulating obscene matter and in providing maximum free speech protections. Appendix A, p. viii. These hypothetical state interests, without basis in fact or reason, cannot save this statute.

The evils perceived by the Court of Appeal below, the proliferation of obscene matter and the impingement on fundamental First Amendment guarantees, are identical with respect to each of the classes of persons accorded disparate treatment by California Penal Code §311.2. For example, an individual engaged in an occupation involving the distribution of possibly obscene matter, such as a bookstore clerk or a library clerk, deserves the same free speech protections as a person employed in an occupation involving the exhibition of possibly obscene matter, such as a motion picture projectionist or a display ad bearer. Similarly, the public deserves as much protection from obscene matter exhibited by individuals employed by a business licensed by the city or county as from obscene matter exhibited by individuals employed by unlicensed businesses. The underinclusiveness of California Penal Code §311.2 with respect to any of these classes of people is invidious. See, *Eisenstadt v. Baird*, *supra*, 405 U.S. at 450; *Railway Express Agency v. New York* (concurring opinion of Mr. Justice Jackson), 336 U.S. 106, 112-13 (1949).

5. Plenary Review Of This Case Is Necessary To Insure The Uniform Application Of Equal Protection Principles

In response to the growing public concern over the seeming proliferation of obscene matter, various state legislatures have enacted complex schemes to cope with this problem. Because of the complexity of these statutory schemes and because of the differing equal protection standards utilized by the courts, conflicting decisions are appearing in the reporters.

Some jurisdictions have found statutory schemes similar to that of California Penal Code §311.2 to be violative of the Equal Protection Clauses of the United States Constitution and of their respective state constitutions. In *Wheeler v. State of Maryland*, 380 A.2d 1062 (1977), the Maryland Court of Appeal analyzed a statute making it a crime to distribute or to exhibit obscene matter while exempting from criminal prosecution an employee of a motion picture theatre who had no financial interest in nor entrepreneurial control over the operations of that theatre. The *Wheeler* court held that the exemption of movie theatre employees from criminal liability had no rational relationship to any legitimate state interest and was therefore unconstitutional on equal protection grounds.³

³Interestingly, in *Wheeler* the Maryland court did draw a distinction between obscene motion pictures (i.e., "exhibition") and other obscene matter, noting that under guidelines suggested by *Miller v. California*, *supra*, 413 U.S. at 26, "a classification based upon control of obscene films and pictures more lenient than those imposed on other obscene matter certainly could not serve as a rational basis for that classification in light of the governmental objective." *Wheeler*, *supra*, 380 A.2d at 1060. It would appear that, applying the less strict test of "rational

Similarly, the Louisiana Supreme Court found the Louisiana obscenity statute, by exempting employees of museums, public libraries, and governmental agencies from criminal liability for "trafficking" in hardcore pornography, deprived non-exempt persons of the equal protection of the laws. *State v. Luck* (Louisiana Supreme Court, Nos. 60,177 & 60,178, November 14, 1977), 3 Med.L.Rptr. 1571. The *Luck* court found that the statutory classifications, based on the industry or institution in which an individual was employed, were not reasonably related to any valid governmental purpose.

Appellants urge this Court to secure the uniform application of equal protection standards and principles to statutory schemes regulating the distribution and exhibition of obscene matter, by granting plenary review of the present case.

G. CONCLUSION

For all of the above reasons, Appellants submit that the questions presented on appeal are substantial and of substantive public importance. Further, Appellants submit that the opinion of the California Court of Appeal below, upholding the constitutionality of California Penal Code §311.2, according disparate treatment to similarly situated classes of

relationship," the Maryland Court could, in some circumstances, permit the proscription of the exhibition, but not the distribution of the identical matter, thus giving the precisely opposite result from the California District Court of Appeal.

persons solely on the basis of occupation and employment status, is so beyond rational justification as to merit summary reversal by this Court.

Appellants, therefore, pray that the decision below be summarily reversed on the strength of *Eisenstadt v. Baird, supra*, and *Reed v. Reed, supra*, and similar cases; or, in the alternative, that this Court note probable jurisdiction over this appeal, and accept the same for plenary review.

Dated, August 29, 1978.

Respectfully submitted,

MICHAEL KENNEDY,

Attorney for Appellants.

(Appendices Follow)

Appendices

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

*In the Court of Appeal
State of California
First Appellate District*

DIVISION THREE

Galen Lee Randolph and Duque
Williams, aka "Cashier Doe",
Plaintiffs and Appellants,

vs.

Municipal Court, Southern Judicial
District, County of San Mateo,
Defendant,

People of the State of California,
Real Party in Interest
and Respondent.

1 Civil
No. 42320
(Sup. Ct.
#213083)

Galen Lee Randolph and Mosa Tata-
kamontonga,
Plaintiffs and Appellants,

vs.

Municipal Court, San Mateo County,
Northern Judicial District,
Defendant,

People of the State of California,
Real Party in Interest
and Respondent.

1 Civil
No. 42321
(Sup. Ct.
#213084)

[Filed Apr. 13, 1978]

OPINION

These are two consolidated appeals from denials of appellants' petitions for writ of mandate in the superior court. Each writ was sought on the ground that the municipal court erred in overruling appellants' demurrer to a complaint charging them with violation of Penal Code section 311.2 (exhibition and distribution of obscene matter).¹ The issue raised on appeal in each case is the same, namely, whether or not Penal Code section 311.2 is unconstitutional and void on its face in that it violates the equal protection clause of the Fourteenth Amendment of the

¹Penal Code section 311.2 reads as follows:

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

(c) Except as otherwise provided in subdivision (b), the provisions of subdivision (a) with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter.

United States Constitution² and the California Constitution.³

Appellants specifically argue that Penal Code section 311.2 is unconstitutional because it classifies, as exempt, motion picture operators and employees of licensed persons under certain conditions. We disagree, relying upon the discussion of Division One of this court in *People v. Kuhns* (1976) 61 Cal. App. 3d 735, 759-760, and *Gould v. People* (1976) 56 Cal. App. 3d 909, 920.

Prior to the exemption of subdivision (c) being added to Penal Code section 311.2, the court in *People v. Haskin* (1976) 55 Cal. App. 3d 231, disposed of the equal protection argument with the following argument at pages 240-241:

"Defendants next argue that Penal Code section 311.2 is unconstitutional in that it violates the Fourteenth Amendment provisions for equal protection, because it classifies, as exempt, motion picture operators or projectionists."

One limitation on legislation imposed by the equal protection clause is that "[a] classification which results in differences of treatment " "must not be arbitrary, but must be based upon some differences in classes having a substantial relation to a legitimate object to be accomplished." "

²The Fourteenth Amendment to the federal Constitution provides in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

³In Superior Court Action No. 213083, appellant Randolph pleaded guilty "conditionally" to one count, was sentenced to four months in county jail, and is presently on bail pending appeal. Appellant Williams was to have his trial date set on October 24, 1977.

(*In re R. C.* (1974) 39 Cal.App.3d 887, 894 [114 Cal.Rptr. 735].) We see nothing unreasonable or arbitrary in the class of persons exempted from Penal Code section 311.2. Defendants' argument that the statute should exempt others (as: a bookstore clerk, an usher, a ticket taker) falls upon deaf ears, for a regulatory statute need not cover the whole of a permissible field and, recognizing degrees of evil, may deal only with the more important exemptions from such evils (see: 5 Witkin, Summary of Cal. Law (8th ed.) Constitutional Law, §§ 342, 343, pp. 3637-3640; 13 Cal.Jur.3d Constitutional Law, §§ 322, pp. 595-596). The question of "intent" becomes more pertinent as the statute is carefully analyzed. (*In re Klor* (1966) 64 Cal.2d 816, 820-821 [51 Cal.Rptr. 903, 415 P.2d 791]), as we are required to do where a suspect classification appears, as here, involving a First Amendment right. (5 Witkin, *supra*, § 343, pp. 3639-3640; 13 Cal.Jur.3d *supra*, § 337, pp. 627-629.)"

The court in *Gould v. People* (1976) 56 Cal. App. 3d 909, 919-920 also had occasion to comment on the equal protection argument prior to the addition of subdivision (c) as follows:

"Plaintiffs finally contend, in respect to the constitutionality of section 311.2, that it violates the equal protection clause of the Fourteenth Amendment in that motion picture projectionists are exempt from punishment. Plaintiffs theorize that since the section involves First Amendment freedoms, "fundamental interests" come into

Both appellants in Superior Court Action No. 213084 pleaded guilty. Randolph was sentenced to six months, four months suspended, with a fine, and is on bail pending appeal from that conviction. Tatakamontonga's sentence was suspended.

play and thus the "strict scrutiny" test is applicable. This contention is also without merit.

California "[c]ase law has developed a two-level standard in evaluating legislative classifications under the 'equal protection' clause. The traditional test is that there is a presumption of constitutionality which will not be overthrown by the courts unless it is palpably arbitrary and beyond rational and reasonable doubt erroneous and no set of facts reasonably can be conceived that would sustain it. This traditional test is usually applied to 'economic' regulations.

"The other, and stricter, standard is employed in cases involving 'suspect classifications' or 'fundamental interests.' Here, the courts take a close look at the classification and require not only a *compelling* state interest which justifies the law, but also that the distinctions drawn by the law are *necessary* to further its purpose. (*In re Antazo*, 3 Cal.3d 100 [89 Cal.Rptr. 255, 473 P.2d 999]; *California State Employees' Assn. v. Flournoy*, 32 Cal.App.3d 219 [108 Cal.Rptr. 251].)" (*Alex v. County of Los Angeles* (1973) 35 Cal.App.3d 994, 1000-1001 [111 Cal.Rptr. 285].)

It would be academic to analyze whether section 311.2 falls in the category of "economic" or "fundamental interest" or hybrid, and which standard should apply. We hold, applying the stricter standard,⁸ that the exemption of projectionists is valid and does not violate the equal protection clause because it tends to promote rather than inhibit dissemination of speech as protected by the First Amendment which constitutes a compelling state interest justifying the classification.

After the amendment of Penal Code section 311.2, wherein subdivision (c) was added, our court had another opportunity of rejecting appellants' equal protection argument in the case of *People v. Kuhns* (1976) 61 Cal. App. 3d 735. After incorporating the last paragraph of the above quoted language from *Gould v. People ex rel. Busch, supra*, in its opinion, the court in *People v. Kuhns, supra*, added the following: "For the reasons stated above we also conclude that the addition of subdivision (c), insofar as it may be applicable to this case, is a proper exercise of the Legislature's right to classify regulatory statutes". (p. 760.)

Appellants concede that each of the above cited cases upheld the constitutionality of Penal Code section 311.2 against an attack of equal protection under the Fourteenth Amendment. They argue, however, that the three decisions were erroneously decided because the courts did not utilize the strict scrutiny approach to the equal protection problem as required by *People v. Olivas* (1976) 17 Cal. 3d 236 and *Cotton v. Municipal Court* (1976) 59 Cal. App. 3d 601.

It is correct as stated in *People v. Olivas, supra*, that:

"... in cases involving "suspect classifications" or touching on "fundamental interests," [fns. omitted] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies

the law but that the distinctions drawn by the law are *necessary* to further its purpose.'" (*Serrano v. Priest* (1971) 5 Cal.3d 584, 597 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839, 471 P.2d 487], vacated on other grounds (1971) 403 U.S. 915 [29 L.Ed. 2d 692, 91 S.Ct. 2224]; *In re Antazo* (1970) 3 Cal.3d 100, 110-111 [89 Cal.Rptr. 255, 473 P.2d 999].)

(pp. 243-244.)

In *Olivas* the court concluded that "personal liberty is an interest which is entitled to the same protection as other fundamental interests" and that the strict scrutiny test should be applied where the statute was one which could be applied to deprive the defendant of his personal liberty. (Id. at 251; Accord *People v. Terflinger* (1978) 77 Cal. App. 3d 302; *Bosco v. Juvenile Court* (1978) 77 Cal. App. 3d 170, 190; *Cotton v. Municipal Court, supra*, 59 Cal. App. 3d at 606-607.)

The State's compelling interest in controlling obscenity is apparent. The real question in the case at bench, therefore, is whether the exemption of projectionists and employees of licensed persons, acting within the scope of their employment and without financial interest in the place or control over exhibition is *necessary* to the state purpose of suppressing obscenity.

Although neither the *Gould* nor *Kuhns* court considered itself compelled to apply the strict scrutiny

test, both did conclude that the test was met. In *Gould* the exemption for projectionist was found valid because it tended "to promote rather than inhibit dissemination of speech as protected by the First Amendment" (56 Cal. App. 3d at 920). In *Kuhns* the court adopted the rationale as to projectionists and extended it to apply to the exemptions in subdivision (c). (61 Cal. App. 3d at 759.) We agree with the conclusions of those two courts. The exemptions in subdivisions (b) and (c) of section 311.2 are necessary because they allow the State to control obscenity while at the same time providing maximum protection for free speech guarantees by removing from mere employees and projectionists the onus of deciding whether distribution or exhibition of *possibly* obscene matter should be suppressed.

During oral argument, appellants referred us to the recent case of *Wheeler v. State of Maryland* (1977) 380 A. 2d 1052, and argued that this case should be dispositive of the issues present in the case at bench. We disagree. The decision in that case is readily distinguishable. Although the statute in Maryland was similar in many respects to Penal Code section 311.2, it exempted only those employed in movie houses. The defendant in the Maryland case was an employee in a book store. Thus, his attack was properly upon the distinction between employees in book stores and employees in movie houses. To the extent that the Maryland statute prohibited some employees of some legal entities from selling, distributing, publishing and printing obscene matter,

while allowing employees of other legal entities to do so, it clearly violated the equal protection clause of the Fourteenth Amendment and the Maryland court properly struck it down as being unconstitutional. The Maryland statute was patently arbitrary and could not be justified by a compelling state interest.

We therefore affirm the ruling of the trial court in denying the petition for writs of prohibition and/or mandamus.

We concur:

Anello, J.*

Scott, Acting P. J.

Feinberg, J.

*Judge of the Superior Court, assigned by the Chairperson of the Judicial Council.

Appendix B

ORDER DUE
June 12, 1978

*In the Supreme Court
of the
State of California*

IN BANK

Galen Lee Randolph and Duque
Williams, aka "Cashier Doe",
Plaintiffs and Appellants,
vs.

Municipal Court, Southern Judicial
District, County of San Mateo,
Defendant,

People of the State of California,
Real Party in Interest
and Respondent.

1 Civil
No. 42320
(Sup. Ct.
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Galen Lee Randolph and Mosa Tata-
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Defendant,

People of the State of California,
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1 Civil
No. 42321
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#213084)

[Filed June 9, 1978]

ORDER DENYING HEARING

After Judgment by the Court of Appeal
1st District, Division 3, Civil Nos. 42320, 42321
Appellants' petition for hearing DENIED.

Bird

Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this day of Jun 29 1978.

(seal)